COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-3

LONG MANUFACTURING COMPANY, *Petitioner*

v.

LILLISTON IMPLEMENT COMPANY, *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CONSTITUTIONAL PROVISION, STATUTES, AND RULE CITED

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ABBREVIATIONS AND DESIGNATIONS

Pet. Petition for Writ of Certiorari.

Pet. A. Appendix to Petition.

p. page designation to Petition or Appendix to Petition.

Note: designation of pages of Appendix to Petition are followed by the suffix "a".

(IIIA ...) refers to Volume III of the Appendix in the Court of Appeals, each page of which is identified by number.

(PX ...) refers to Plaintiff's exhibits.

(DX ...) refers to Defendant's exhibits.

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I

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, of which review is sought (now officially reported at 457 F.2d 1317 (1972)) is reprinted in the Appendix to the Petition (Pet. A. p. 1a).

The opinion of the District Court, E.D.N.C., officially reported at 328 F.Supp. 268 is reprinted in the Appendix to the Petition (Pet. A. p. 2a-40a).

II

JURISDICTION

The jurisdictional requisites for filing the Petition are adequately stated in the Petition, namely 28 U.S.C. 1254(1) reprinted in the Appendix to the Petition (Pet. A. p. 42a); however, there is no valid reason for review as provided by Supreme Court Rule 19(1)(b).

III

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

This case involves Article I, Section 8, Clause 8, of the Constitution, and Sections 103 and 282 of the Patent Code, 35 U.S.C. §§ 103 and 282.

Constitution

Article I, Section 8. The Congress shall have Power

* * *

8. To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writing and Discoveries;

Patent Code

35 U.S.C. 103. Conditions for patentability; non-obvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

35 U.S.C. 282. Presumption of validity; defenses

A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it.

The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded:

* * * *

(2) Invalidity of the patent or any claim in suit on any ground specified in part II of this title as a condition for patentability,

* * * *

Supreme Court Rules

Rule 19. Considerations governing review on certiorari

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * * *

(b) Where a court of appeals has decided a federal question in a way in conflict with applicable decisions of this court;

* * * *

IV

QUESTIONS PRESENTED

1. Whether the Courts below have decided a Federal question in a way which conflicts with applicable decisions of this Court?

Note: Petitioner in setting out particulars to the above generic question asks:

"1.(a) Whether a novel combination of elements may properly be held unpatentable where the

> Court relies on *A. & P. Tea Co.* v. *Supermarket Corp.*, 340 U.S. 147 (1950) and does not apply *Graham* v. *John Deere Co.*, 383 U.S. 1 (1966)." (Pet. p. 2)

This is not in conformity with decisions below. The Court of Appeals found agreement with the decision of the District Court which *did not* find a *novel combination of elements* but only a new or different *arrangement of old elements* all of which were previously combined in prior art machines.

Moreover, *Graham* v. *John Deere Co.*, 383 U.S. 1 (1966) was applied and copious references made thereto.

Petitioner further asks:

> "1.(b) Whether, assuming the question of part (a) is answered affirmatively, the Court below erred in its application of *A & P* by its failure to make any finding as to whether Long's admittedly novel combination of elements 'perform any additional or different function in the combination than they perform out of it'. (340 U.S. 147 at 152)" (Pet. p. 2)

As pointed out with respect to 1.(a) above, the District Court *did not* find any *admittedly novel combination of elements.*

Furthermore, the District Court did make findings with respect to each patent in suit that the old elements which make up the device did not perform any additional or different function in combination than they performed out of it. Therefore, the District Court did not err in its application of *A & P.*

In view of the discrepancies in Petitioner's particulars 1.(a) and 1.(b), only the broad question appears proper.

2. Whether there is a conflict between this Court's rulings in *Anderson's-Black Rock, Inc.* v. *Pavement Salvage Co.*, 396 U.S. 57 (1969) (including *A & P*) and *Graham*?

V

COUNTER STATEMENT OF THE CASE

This is a case of alleged patent infringement. Two separate patents of the Petitioner are involved, namely, U.S. Patent No. 2,974,467 hereinafter referred to as "467" and U.S. Patent No. 3,007,475 hereinafter referred to as "475". The action was commenced in the United States District Court for the Eastern District of North Carolina on August 26, 1967. Jury trial was waived and the case came on regularly to be tried by the Honorable Walter E. Hoffman, Judge, by designation from the Eastern District of Virginia. The District Court filed a written memorandum opinion of its findings, conclusions and decision in June, 1971 (Pet. A. p. 2a-40a). Judgment was entered in August, 1971 adjudging both patents in suit and each claim thereof invalid; that Defendant has not and is not now infringing Patent No. "467"; and decreed that Plaintiff take nothing of the Defendant and that the action be dismissed on the merits. However, the Trial Court held that had it determined Patent No. "475" valid, then in that event the Defendant would be infringing said patent under the doctrine of equivalents. The Court denied the Defendant, as the prevailing party, attorneys' fees. (Pet. A. p. 41a)

The Plaintiff appealed and the Defendant cross-appealed from the portions of the judgment order that were adverse to each.

In a per curiam opinion decided April 4, 1972, after full consideration of the briefs and oral argument, the Court of Appeals for the Fourth Circuit agreed with the decision of the District Court that both of the patents in suit are invalid on the ground of obviousness to persons reasonably skilled in the art. In June, 1972, the Petition for Writ of Certiorari was filed.

The Long "467" Patent

Patent "467" relates to the front or pickup end of a peanut combine. As best shown in Figure 1 (IIIA 1) of this patent, the combine comprises front and rear threshing cylinders and an intermediate stripper cylinder which strips the vines from the front cylinder and passes them over the imperforate portion 59 of a breastplate 51 shown in Figure 8 (IIIA 4) to the rear cylinder. The vines are fed to the front threshing cylinder by the pickup 15-22 which includes spring fingers 19 which pick up the vines from the ground and deliver them directly to the front threshing cylinder. The threshing cylinders cooperate with curved sections of breastplate 51, which portions have perforations through which spring fingers project and cooperate with spring fingers on the threshing cylinders to detach the peanuts from the vines. The openings in the breastplate adjacent the rear cylinder are large enough to permit peanuts to fall through.

Claims 1-4 of the "467" patent (IIIA 10) were asserted.

Petitioner's argument basing validity on the simultaneously elevating and threshing theory raised on

appeal and again presented here has no merit in fact. None of the four claims of the "467" patent (IIIA 10) are directed to this so called or alluded to "dual function". Contrary to Petitioner's contention that the prior art did not have threshing cylinders arranged on an incline effective to elevate (Pet. p. 4), the District Court found:

> "Like the Long combine, the Livermon patent has a series of two cylinders whereby the rearward one is a little higher than the first. It should also be noted that the configuration of the two cylinders with a transfer cylinder between found in the Livermon patent, along with arcuate and perforated breastplates under each of the threshing cylinders and an imperforate plate which attaches the two arcuate perforated breastplates, is almost identical to the pattern used by Long.[24]" (Pet. A p. 10a-11a)

The Livermon patent, which was before the Examiner, was for a peanut picker. However, the same threshing cylinder arrangement was embodied in the Livermon combine DX 108 (IIIA 212-219) which was part of the pertinent art relied upon by the District Court that was not before the Examiner in the Patent Office.

The Long "475" Patent

Patent "475" (IIIA 11) is directed to the rear end of a combine where the peanuts are separated from the vines. This portion includes a stepped pan 85 which receives peanuts falling through the openings 67 in breastplate 51 under the rear threshing cylinder. As the vines leave that cylinder, they are received by a vine rack 74 which moves them to the rear of the combine where they are discharged by the members 80. The peanuts on pan 85 are fed rearwardly onto screen 95

which has perforations through which air from blower 98 is forced under pressure to blow away lightweight material from the peanuts. Peanuts discharged from screen 95 pass down an incline and through a grill 111, whence they pass into a flared member 112 and are then supposed to fall into discharge pipe 113 where air under pressure from a second blower 130 is said to move them across the combine in pipe 113 and up to the top of the combine in an inclined portion of that pipe, where the air pressure is lowered and the peanuts are released and collected for bagging.

All eight claims (IIIA 17) of the "475" patent were asserted. Petitioner relied on at Trial and on Appeal and relies here on what he calls a "downwardly inclined stepped screen". No claim of the "475" patent is directed to such a structure. The only claim that mentions a stepped screen is Claim 1 which is silent as to any inclination. The other claims variously recite a screen, an inclined screen, or a downwardly inclined screen; but are silent as to any stepped configuration.

Although, as discussed above, none of the claims of the "475" patent call for a "downwardly inclined stepped screen", the District Court adequately considered Petitioner's contention in this regard and found as follows:

> "Of the three aforementioned elements which the Plaintiff contends makes his machine different from the prior art, Long mainly relies on what he calls a 'downwardly inclined stepped screen.' Although it is true that the Plaintiff has the first machine with a stepped screen inclined toward the rear, *it has already been shown that this is not the first combine to contain a stepped screen; nor is it the first combine where the screen works in connection with a blower in the cleaning process, which*

Long alleges is one of the advantages of his particular arrangement. Furthermore, this is not the first combine which has suggested a slanting screen. In fact, in some combines the stepped screen, although usually horizontal, was made so that it could be adjusted to a slanting position. In others, the screen was made to be slanted but slanted toward the front rather than toward the rear. In light of this evidence, we conclude that not only was this not a novel idea, but also that it was obvious to one of ordinary skill in the art. If anything, this arrangement only showed mechanical ability which, of course, will not suffice for invention." (Emphasis added—Pet. A. p. 31a-32a)

Petitioner infers that the industry is dependent upon its combine; that it supplants prior combines; that it alone reduced the hazard of rain damage to the crop; and that the combines of the prior art were discontinued when Petitioner's alleged invention became known.

Such was not the finding of the courts below. Many of the prior art combines had come and gone before Petitioner entered the field and the finding of the Trial Court was as follows:

"*Around 1945, the idea developed that labor could further be reduced by producing a combine* which would move through the fields and harvest the peanut vines, which would previously be plowed up and placed in windrows rather than operating the machines in a stationary position. In addition to saving labor, another attractive feature about this method of harvesting is that the peanut vines could be harvested only a short period of time after having been dug up, since they would dry more quickly in the windrows than while piled up around stakes. *Accordingly, the hazard of rain damage to the exposed peanuts would be reduced.* Pursuant to these ideas and advantages, many ma-

chines were developed and patented, among which are the combines involved in this litigation.

"W. R. Long, the president of the *plaintiff company started working on the patented combine in 1956* and, by 1957, had built his first prototype." (Emphasis added—Pet. A. p. 5a)

* * * * *

"Secondly, in our case most of the patents and combines of the prior art which are being dealt with were created within a decade of the time when Long's combine was patented. During this time new ideas were rapidly being developed and re-evaluated in the field of peanut combines. In the development of successive machines and particularly in an area crowded with patents as the peanut combine field is, it is clear to the Court that as new ideas and devices are developed, older ones are phased out or may even prove utterly worthless. This may well be what happened here, and to allow the knowledge that the older patents imparted to then be patented would be to withdraw what is readily known and disclosed from the public domain contrary to the dictates of the constitution." (Pet. A. pp. 37a, 38a)

VI

ARGUMENT

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit states that after full consideration of the briefs and oral argument, it is in agreement with the decision of the District Court that both of the Appellant's patents are invalid on the ground of obviousness to persons skilled in the art. It is submitted that the District Court's decision on the issue of validity was correct in every material respect.

The first reason alleged by the Petitioner for granting the writ requested is that the lower courts relied on

Great Atlantic and Pacific Tea Co. v. *Supermarket Equipment Corp.*, 340 U.S. 147 (1950) (hereinafter referred to as *A & P*) and did not apply *Graham* v. *John Deere Co. of Kansas City*, 383 U.S. 1 (1966) (hereinafter referred to as *Graham*).

This allegation is not correct since the District Court did rely on and apply the *Graham* decision. Thus, the District Court said:

> "The recent case of *Graham* v. *John Deere Co.*, 383 U.S. 1 (1966) established the test to be applied for cases arising under 35 U.S.C., section 103. In *Graham*, Mr. Justice Clark said:
>
> > 'Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined.' [13]" (Pet. A. p. 9a)
>
> * * * * *
>
> "As has been seen earlier, *Graham* v. *John Deere Co.*, supra, explicitly states that when 35 U.S.C., section 103, was enacted in 1952, the test of nonobviousness was added to the previously established tests of novelty and utility which must be met in upholding the validity of a patent. It is under the test of nonobviousness that the Court here invalidates the patents in question, . . ." (Pet. A. p. 37a)

With respect to Patent No. 2,974,467, the District Court found:

> "Applying the *Graham* test to the case at hand, it is clear that all the working parts of the outstanding features of Patent Number 2,974,467 appear in previous patents and combines, which must

be considered part of the prior art.[14]" (Pet. A. p. 9a)

* * * * *

"This examination of the prior art as compared with each element of the patent in question compels the conclusion that each element was obvious to one of ordinary skill in the art, and therefore would not be patentable separately. Even so, a combination of these old elements could be patentable if invention can be found in the combination.[25]" (Pet. A. p. 11a)

* * * * *

"While the patentee should be commended for his success in arranging these old elements into a mechanically functional and most desirable combine, the new arrangement is only evidence of mechanical skill and falls short of the test of inventiveness.[27]" (Pet. A. p. 14a)

Thus, as to the Patent No. 2,974,467, the District Court recognized the *Graham* case as establishing a test to be applied and correctly applied that test by ascertaining the differences between the prior art and the claims at issue and resolving the level of ordinary skill in the pertinent art, resulting in a holding that mechanical skill only was involved.

Similarly, with respect to Patent No. 3,007,475, the District Court said:

"Under 35 U.S.C., section 103, and the *Graham* case, which sets forth the test to be applied thereto, it is clear that all of the significant features of patent number 3,007,475 appear time and again in the prior art, and that Long has simply combined old elements, otherwise not patentable by themselves, into a new machine. An in-depth comparison of the prior art, with what Long claims, will reveal the lack of novelty and nonobviousness and

hence the lack of invention of any single element." (Pet. A. p. 29a)

* * * * *

"From the foregoing survey of the prior art as compared with each element in the patent, it is clear that each feature of the patent was obvious to one skilled in the art and therefore would not be patentable by itself. It is equally clear, however, that if invention can be found in the combination of these old elements, then the patent is valid.[69]" (Pet. A. p. 30a)

* * * * *

"In concluding that patent number 3,007,475 is anticipated by the prior art and therefore invalid, it is noted that every significant feature of this patent appears not only in various combines throughout this history of the art, but also that they all appear in a single device in the prior art—the Frick combine, which, incidentally, was not before the patent examiner when Long's application was being processed. These points are particularly significant here in light of the factual situation that arose in *Graham*. There the Supreme Court examined the prior art and found that every essential element of the claimed patent was part of the prior art. In fact, the Court found that all of the items were included in the same patent (which was not before the patent examiner) except that two of the elements were reversed. Even so, however, the Court noted that their mechanical operation was identical and the same function was served. The patent was held invalid. In following the reasoning and result of *Graham* and holding that all eight claims of patent number 3,007,475 are invalid as anticipated by the prior art, it is also appropriate to conclude, as the Supreme Court did, that the patent in question 'presents no operative mechanical distinctions, much less nonobvious differences.'" (Pet. A. p. 33a)

The Petitioner also alleges that the District Court did not "give any weight to secondary considerations as set forth in *Graham*." These considerations are "commercial success, long felt but unsolved needs, failure of others, etc." and were clearly recognized by the District Court in its statements that:

> ". . . we take cognizance of the fact that some of the combines considered here as part of the prior art had been discontinued around the time that Long received his patent.[80]" (Pet. A. p. 37a)
>
> * * * *
>
> "We are also mindful of the fact that while many peanut combines previous to Long's were not commercially feasible, Long's machine has enjoyed substantial commercial success." (Pet. A. p. 38a)

These circumstances did not convince the Trial Court that the claimed subject matter was nonobvious.

In view of the foregoing, and of the entire content of the District Court's decision, it is submitted that the contention that the Trial Court did not apply the test of the *Graham* decision is untenable. Apparently, the results of such application were not what the Petitioner considers they should have been.

It is the findings of fact of the Trial Court that spells the invalidity of the patents in suit. The law as determined by the decisions of this Court applied to the facts as found by the Trial Court inevitably results in a judgment of invalidity. The Petitioner cannot demonstrate that there has been a misapplication of law to the facts as found. Given the findings of fact as determined by the Trial Court or conceding that they are not clearly erroneous as the Petitioner must do here renders the District Court's Judgment and Conclusion obviously sound.

The Petitioner's second alleged reason for granting the writ is that assuming the viability of *A & P*, the

District Court erred in its application of *A & P*. Here the Petitioner says:

> "Thus, in the case at bar there was no finding whether the elements perform any additional or different *function* in the combination than they perform out of it". (Emphasis quoted Pet. p. 11)

Petitioner's statement seems clearly incorrect. With respect to Patent No. 3,974,467, the District Court said:

> "In addition, the functions of the elements in Long's combine are the same as the functions they have performed in other combines." (Pet. A. p. 13a)

With respect to Patent No. 3,007,475, the District Court said:

> "In addition to the fact that every important feature of patent number 3,007,475 appears in the prior art, no new and different function or result can be found in any of these elements in Long's machine, either separately or as a combination." (Pet. A. p. 31a)

And then, with respect to both of the patents in suit, the District Court said:

> "In essence, both of these patents involve a combination of old parts or elements well known in the art. Although these combinations are recognized as forming a commercially profitable machine, no new function, operation or result can be found in either combination." (Pet. A. p. 39a.)

Clearly the Trial Court's findings answered the question of whether the elements of the claimed combination perform any additional or different function in the combination than they perform out of it. The findings were adverse to the Petitioner but such furnishes no basis for granting the petition to review the decision below.

The third reason alleged in the petition for granting the writ is that there is a "basic conflict" between the *A & P* case and *Anderson's-Black Rock* on one hand, and the *Graham* case on the other.

It is submitted that there is no conflict, basic or otherwise, between the three decisions in question. The *A & P* case was cited in each of the other two cases and that case, as well as the *Graham* case, was cited in the *Anderson's-Black Rock* case, and nowhere is there any intimation that any conflict was thought to exist. On the contrary the opinion in *Anderson's-Black Rock* discusses both of the other cases in detail and relies on both of them in reaching its conclusion.

The *A & P* case asserts the principle that a combination of old elements is not patentable unless the function of the whole combination in some way exceeds the sum of the functions of its parts. This principle of synergistic effect was reaffirmed in the *Anderson's-Black Rock* case. It is to be noted that this is not a universal test of patentability, but applies only to combinations of old elements.

This Court, in the *Graham* case, made it clear that the Congress by the Patent Act of 1952 *added* a third statutory dimension to the *two* requirements of novelty and utility that had been sole statutory tests since the Patent Act of 1793, namely the test of obviousness.

In considering what effect the 1952 Act had upon traditional statutory and judicial tests of patentability and what definitive tests are now required, this Court in *Graham* said:

> "We have concluded that the 1952 Act was intended to codify judicial precedents embracing the principle long ago announced by this Court in Hotchkiss v. Greenwood, 11 How. 248, 13 L.Ed. 683

(1851), and that, while the clear language of § 103 places emphasis on an inquiry into obviousness, the general level of innovation necessary to sustain patentability remains the same." *Graham* at 3 and 4.

This Court, further elucidating in *Graham* as to the basic factual inquiries to be considered under the § 103 condition, stated:

> "While the ultimate question of patent validity is one of law, Great A. & P. Tea Co. v. Supermarket Equipment Corp., supra, 340 U.S. at 155, 71 S.Ct. at 131, the § 103 condition, *which is but one of three conditions, each of which must be satisfied,* lends itself to several basic factual inquiries. Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy." (Emphasis added) *Graham* at 17 and 18

The expression of this Court in *Graham* in no way indicates any conflict with *A & P* but sets forth guide lines to determine the obviousness or nonobviousness of the subject matter which is an added condition required by the Patent Act of 1952.

The *A & P* and *Anderson's-Black Rock* cases, on one hand, relate to the specific situation in which a combination of old elements is involved, and both cases, as

above noted, hold that in such a situation the total function must in some way exceed the sum of the individual functions. That holding was by no means new, but was based on a number of prior cases cited in the *A & P* opinion. It is not reasonable to suppose that this Court, by its pronouncements as to obviousness in the *Graham* decision, intended to overrule that established principle in general, and the *A & P* decision in particular; and the reaffirmance of the *A & P* principle in the *Anderson's-Black Rock* case, together with a citation and discussion of the *Graham* decision, makes it clear that there was no such intention and that this Court did not consider that there was any conflict between *A & P*, *Graham*, or *Anderson's-Black Rock*.

Moreover, any contention that this Court, in the *Graham* opinion, intended to impose any new standard of patentability is effectively negatived by the following express statement in that opinion:

> "We believe that this legislative history, as well as other sources[9] shows that the revision was not intended by Congress to change the general level of patentable invention. We conclude that the section [35 U.S.C. 103] was intended merely as a codification of judicial precedents embracing the Hotchkiss condition, with congressional directions that inquiries into the obviousness of the subject matter sought to be patented are a prerequisite to patentability." *Graham* at 17

The *A & P* and *Anderson's-Black Rock* cases simply state a rule to be applied in a specific case, namely that it will always be within the skill of the art to assemble old elements in combination if each element of the assembly merely performs its old function in the old way and the aggregate result is the sum of the functions of the elements. This is simply a rule of thumb for deter-

mining obviousness or nonobviousness in one of the many types of situations in which such a determination must be made. It is not at variance with anything contained in the *Graham* decision but is an aid in applying the principle of that decision to a specific kind of case; and it was so properly used by the District Court in the instant case.

To sum up, the *Graham* case holds that, in determining obviousness or nonobviousness, the scope and content of the prior art are to be determined, differences between such art and the claims are to be ascertained and the level of ordinary skill in the pertinent art is to be resolved, while the *A & P* and *Anderson's-Black Rock* cases hold that if, as the result of such a determination, it is found that the claims are drawn to a combination of elements, each of which is shown to be old in the prior art, then it would be obvious to combine those elements unless the combination produces a result different from the sum of the functions of the separate elements. This does not involve any conflict of decisions and does not present a situation in which the granting of certiorari would be appropriate.

The petitioner alleges that the *Anderson's-Black Rock* case has had the effect of causing the Court of Appeals for the Fourth Circuit to hold all patents coming before it invalid.

The number of cases involved appears to be too small to be significant, particularly since it is not shown how many of the cases decided involved combinations of old elements; but, so far as they might be considered as establishing any trends, they do not support the Petitioner's contentions. Thus, in the five year period preceding *Graham*, when the authority of the *A & P* was presumably unquestioned, the Fourth Circuit Court of

Appeals held seven out of twenty-two, or more than thirty percent of the patents considered, to be valid, while in the period between *Graham* and *Anderson's-Black Rock,* when the supposedly salutary effect of the *Graham* decision was in full force, only two out of fourteen, or less than fifteen percent of the patents considered were held valid. If this has any significance it could be that the *Graham* decision, rather than creating a more liberal standard, as the Petitioner seems to contend that it did, imposed a stricter one.

Assuming, as contended in the petition (Pet. p. 12) that *Graham* was "shoved aside" by *Anderson's-Black Rock,* thus reinstating *A & P* in full effect, then it is proper to consider those cases before *Graham* and after *Anderson's-Black Rock* as a unit; and when so considered, they show seven favorable holdings in thirty decisions, or twenty-three percent of favorable decisions, which is substantially more than the fifteen percent of Petitioner's supposedly golden age of the *Graham* decision.

It follows that the figures cited by Petitioner, if they have any material significance, tend to weaken the Petitioner's position rather than to strengthen it.

VII

CONCLUSION

Respondent submits that the opinion of the Trial Court shows a very able and scholarly application of the applicable law has been made to the controversy involved in this suit and that the Petitioner has received careful judicial consideration of all its contentions. Further that the approval of the Court of Appeals of the Trial Court's decision was entirely just and involves no error or misapplication of the law, nor is there any conflict between decisions of this Court

which were relied upon, nor any question of possible interest or importance which should absorb the time of this Court.

Furthermore, *Graham* was properly considered and the obviousness test properly applied by the District Court; *A & P* was properly considered and properly applied in a case involving a combination of old elements; and there is no conflict between *A & P* and *Anderson's-Black Rock* on one hand and *Graham* on the other.

It is submitted that the public interest has been served by the holding of the Court of Appeals for the Fourth Circuit that the patents in suit are invalid, and that the Petition is wholly without merit and should be denied.

Respectfully submitted,

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